LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JAN 29 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. — 793

MARY HAMILTON,

Petitioner,

—v.—

ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

JACK GREENBERG
NORMAN C. AMAKER
JAMES M. NABRIT, III
CHARLES H. JONES, JR.
10 Columbus Circle
New York 19, New York

OSCAR W. ADAMS, JR.
1630 Fourth Avenue, North
Birmingham, Alabama

Attorneys for Petitioner

INDEX

PAGE

Opinion Below 1

Jurisdiction 1

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement 4

Reasons for Granting the Writ 7

I. This case involves a significant form of racial discrimination affecting the fair administration of justice in the courts and petitioner's contempt conviction sanctioned such discrimination in violation of the Fourteenth Amendment 7

II. The failure to afford petitioner notice and a hearing before punishing her for contempt was a denial of due process of law 19

Conclusion 24

Appendix 25

Opinion Below 25

Judgment 28

Denial of Rehearing 29

Table of Cases

PAGE

Alford v. United States, 282 U. S. 687 17

Bell v. State, 16 Ala. App. 36, 75 So. 181 17
Berger v. United States, 295 U. S. 78 17

Cassell v. Texas, 339 U. S. 282 9
Cooke v. United States, 267 U. S. 517 20

Ex parte Dickens, 162 Ala. 272, 50 So. 218 (1909) ... 6
Ex parte Terry, 128 U. S. 289 20

Garret v. State, 268 Ala. 299, 105 So. 2d 541 17
George v. Clemmons, 373 U. S. 241 8

Havens v. State, 24 Ala. App. 288, 134 So. 814, cert. denied 134 So. 815, 323 Ala. 98 (1930) 18

In re McConnell, 370 U. S. 230 23

Jencks v. United States, 353 U. S. 657 17
Johnson v. Virginia, 373 U. S. 61 ..... 8, 17

Loeb v. Webster, 213 Ala. 99, 104 So. 25 17

Napue v. Illinois, 360 U. S. 264 8

O'Neil v. State, 189 Wis. 259, 207 N. W. 280 (1926) ... 17

Panico v. United States, 375 U. S. 29 ..... 1, 22
People v. LaFrance, 8 Cal. 839, 92 P. 2d 465 17

Re Green, 369 U. S. 689 21
Re Oliver, 333 U. S. 257 ..... 20, 21, 22

PAGE

Sanford v. State, 38 Ala. 332, 83 So. 2d 254 17
Shelley v. Kraemer, 334 U. S. 1 8
State v. Bessa, 115 La. 259, 38 So. 985 (1905) 17
State v. King, 222 S. C. 108, 71 S. E. 2d 793 17
State v. Murdock, 183 N. C. 779, 111 S. E. 610 17
Strauder v. West Virginia, 100 U. S. 303 ..... 8, 9

Taliaferro v. United States, 47 F. 2d 699 (1931) 17
Thomas v. Dorsey, 15 Ala. App. 419, 73 So. 747 17
Tribue v. State, Fla. App., 106 So. 2d 630 17

Ungar v. Sarafite, 375 U. S. 809 23

Viereck v. United States, 318 U. S. 236 17
White v. State, 135 Tex. Cr. 210, 117 S. W. 2d 450 (1938) 17

STATUTES INVOLVED

18 U. S. C. §401 23
28 U. S. C. §1257(3) 1
42 U. S. C. §1981 (Civil Rights Act of 1870) 16
Federal Rules of Criminal Procedure 42(a) 23
Ala. Code of 1940, Tit. 13, Section 2 3
Ala. Code, Tit. 15, Sec. 341 (1958) 5
Ala. Code, Title 7, §442 (1958) 18
La. Stats. Anno. R.S. 14:317 9
S. C. Code (1962), §58-1333 9

OTHER AUTHORITIES

PAGE

21 Ala. Lawyer 193 (1960) 17

Baldwin, Go Tell It on the Mountain (1954) 13

Baldwin, Nobody Knows My Name (1963) 13

Bentham, Rationale of Judicial Evidence, Volume II, Chapter V 17

A. Davis & Dollard, Children of Bondage (1940) 13

A. Davis, B. Gardner & M. Gardner, Deep South (1941) 13

Dawes, "Titles and Symbols of Prestige in 17th Century New England", William and Mary College Quarterly (Jan. 1949) 14

Dollard, Caste and Class in a Southern Town (3rd ed. 1957) 10

Doyle, The Etiquette of Race Relations in the South (1937) 11, 12

Elkins, Slavery (Universal Library Ed. 1963) 16

Ellison, The Invisible Man (1947) 13

1 Encyclopedia Britannica, University of Chicago (1963 ed.) 14

C. S. Johnson, Patterns of Negro Segregation (1943) ..10, 13

Johnson, Growing Up in the Black Belt (1941) 13

Johnson, To Stem This Tide (1943) 13

Moton, What the Negro Thinks (1929) 12, 13

Myrdal, An American Dilemma (1944) 10

Nettels, The Roots of American Civilization: A History of American Colonial Life (1938) 14

PAGE

New York Times Magazine, Dec. 8, 1963 15

Patterson, Colour and Culture in South Africa (1953) .. 14

Richmond, The Colour Problem (1955) 14

Smith, Strange Fruit (1948) 14

Wigmore on Evidence 18, 19

Wright, Native Son (1957) 13

Wright, Black Boy (1951) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

MARY HAMILTON,

Petitioner,

—v.—

ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama which was entered September 26, 1963, rehearing of which was denied October 31, 1963.

Opinion Below

The opinion of the Supreme Court of Alabama of September 26, 1963, is reported at 156 So. 2d 926 and is set forth in the appendix, *infra* p. 25. No opinion was given by the Circuit Court of Etowah County, Alabama.

Jurisdiction

The Supreme Court of Alabama entered its judgment on September 26, 1963 (R. 8), and denied rehearing on October 31, 1963 (R. 14). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioner having

asserted below and here the deprivation of rights, privileges, and immunities secured by the Constitution of the United States.

Questions Presented

Whether petitioner was denied rights protected by the due process and equal protection clauses of the Fourteenth Amendment when she was summarily fined and imprisoned for contempt of court in the following circumstances:

1. Petitioner, a Negro, was a witness in her own behalf at a habeas corpus hearing in an Alabama court. Throughout the hearing the solicitor representing the State persisted in the degrading custom of addressing all Negro witnesses by their first names, declining to call them "Mr." or "Miss" or to use their surnames as he did with all white witnesses, and was sustained in this conduct by the trial judge. Petitioner was held in contempt of court when the prosecutor insisted upon addressing her as "Mary" and she said that she would not answer his questions until he addressed her "correctly."

2. The trial judge ordered petitioner to answer, and upon her statement that she would not answer until she was "addressed correctly," immediately and summarily held her in contempt and sentenced her to a fine and imprisonment, without affording her notice of the contempt charge or a hearing.

Constitutional and Statutory Provisions Involved

1. This case involves section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Alabama Code of 1940, Title 13, Section 2, which provides:

> Powers of court to inflict summary punishment.—The powers of the several courts in this state to issue attachments and inflict summary punishment for contempts, does not extend to any other cases than:
>
> Disrespectful, contemptuous, or insolent behavior in court, tending in anywise to diminish or impair the respect due to judicial tribunals, or to interrupt the due course of trial.
>
> A breach of the peace, boisterous conduct, violent disturbance, or any other act calculated to disturb or obstruct the administration of justice, committed in the presence of the court, or so near thereto as to have that effect.
>
> The misbehavior of any officer of the court, in his official transactions, or the disobedience or resistance of any officer of the court, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command thereof.
>
> Deceit, or the abuse of the process of the proceedings of the court, by any person or party, or any unlawful interference with the process or proceedings of the court.
>
> Refusing to be sworn, or to answer, either in the court or before the grand jury, any lawful question as a witness or garnishee.
>
> When summoned as a juror in a court, improperly conversing with a party to an action, to be tried at

such court, or with any other person in relation to the merits of such action, or receiving a communication from a party, or other person, in respect to it, without immediately disclosing same to the court.

Conversing with a juror, knowing him to be such, in relation to the merits of any action which he is engaged in the trial of; or supplying any juror with any refreshments of any kind, except water, during the time he is engaged in the trial of any cause, without leave of the court.

Statement

On June 25, 1963, petitioner was held in contempt of the Circuit Court of Etowah County, Alabama and sentenced to five days in jail and a fine of fifty dollars (R. 2). On that day petitioner was a witness in her own behalf at a hearing on a petition for a writ of habeas corpus, during which the state solicitor persisted in addressing all Negro witnesses by their first names. When petitioner's counsel objected the trial judge overruled him (R. 2, 3), saying on one occasion, "I'm not going to tell a lawyer how to address a witness" (R. 3). The solicitor addressed only the Negro witnesses by their first names (R. 3).

When the solicitor began cross-examining petitioner he asked her name and she replied, "Miss Mary Hamilton" (R. 2). Addressing her as "Mary," he asked who arrested her (*id.*). She replied that her name was Miss Hamilton and said, "Please address me correctly" (*id.*). Ignoring this request, the solicitor repeated his question, this time adding "Mary" at the end (*id.*). She said she would not answer "until I am addressed correctly" and one of her attorneys interjected that her name was Miss Hamilton (*id.*). The judge then said, "Answer the question" (*id.*).

Petitioner again said she would not answer unless addressed correctly (*id.*). The judge said, "You are in contempt of court." One of petitioner's attorneys attempted to speak at this point saying, "Your honor—your honor—", but the court immediately sentenced petitioner to jail and to a fine.[1]

Petitioner immediately began serving the sentence and completed the five day jail term, but was admitted to bond pending review of the conviction before serving additional time in jail for nonpayment of the fine[2] (R. 1).

On July 25, 1963, petitioner sought review of her sentence of contempt by filing a petition for writ of certiorari in the Supreme Court of Alabama (R. 1), the method under

---

[1] The entire sequence of events appears in the following lines of the record (R. 2):

"Cross examination by Solicitor Rayburn:

Q. What is your name, please?

A. Miss Mary Hamilton.

Q. Mary, I believe—you were arrested—who were you arrested by?

A. My name is Miss Hamilton. Please address me correctly.

Q. Who were you arrested by, Mary?

A. I will not answer a question—

By Attorney Amaker: The witness's name is Miss Hamilton.

A. —your question until I am addressed correctly.

The Court: Answer the question.

The Witness: I will not answer them unless I am addressed correctly.

The Court: You are in contempt of court—

Attorney Conley: Your Honor—your Honor—

The Court: You are in contempt of this court, and you are sentenced to five days in jail and a fifty dollar fine" (R. 2).

[2] Petitioner is liable to serve an additional 20 days in jail in default of payment of the fine. Alabama Code, Title 15, Section 341 (1958).

Alabama law for securing review of a contempt conviction (*Ex parte Dickens*, 162 Ala. 272, 50 So. 218 (1909)). The Alabama Supreme Court denied the petition for writ of certiorari on September 26, 1963 (R. 8) with an opinion on the merits (R. 5).

The petition for certiorari filed with the Alabama Supreme Court alleged that petitioner's contempt conviction violated the equal protection and due process clauses of the Fourteenth Amendment, asserting *inter alia*:

> Petitioner avers that her conviction of contempt in these circumstances was erroneous, unjustified, illegal, null and void, contrary to the decision of this Court and violated her right to the equal protection of the laws and due process of law guaranteed under the Fourteenth Amendment to the Constitution of the United States (R. 2-3).

The verified petition filed in the Alabama Supreme Court, which alleged the circumstances of the contempt conviction was not contradicted by the State and was accepted by the court below as true. Briefs were filed, and the court below ruled on the merits against petitioner's claims, holding that the trial court had power to inflict summary punishment under Alabama Code, Title 13, Section 2, and saying that (R. 7):

> * * * the question was a lawful one and the witness invoked no valid legal exemption to support her refusal to answer it.
>
> The record conclusively shows that petitioner's name is Mary Hamilton, not Miss Mary Hamilton.
>
> Many witnesses are addressed by various titles, but one's own name is an acceptable appellation at law. This practice is almost universal in the written opinions of courts.

> In the cross-examination of witnesses, a wide latitude is allowed resting in the sound discretion of the trial court and unless the discretion is grossly abused, the ruling of the court will not be overturned. * * * We hold that the trial court did not abuse its discretion and the record supports the summary punishment inflicted.

Petitioner's application for rehearing and for stays pending review in this Court were denied without opinion (R. 12, 14), but petitioner has remained at liberty and has not yet served the remaining portion of the sentence.

Reasons for Granting the Writ

I. *This case involves a significant form of racial discrimination affecting the fair administration of justice in the courts and petitioner's contempt conviction sanctioned such discrimination in violation of the Fourteenth Amendment.*

Petitioner was convicted of contempt for refusing to respond to questions as a witness when the solicitor representing Alabama insisted upon addressing her by her first name. It is uncontroverted that the solicitor took such familiarities only with the Negro witnesses who testified at the hearing, and that he persisted notwithstanding objections. Indeed, it is patent that the solicitor, who insisted upon calling petitioner "Mary" even when she asked him not to, was deliberately making a point of addressing her familiarly by her first name. While the significance of this differential treatment is apparent only in the context of the racial caste system, on the surface it is clear that there was a racial discrimination. A public official, the solicitor representing the state in proceedings in its courts, and as such accountable for his conduct under the Fourteenth

Amendment (cf. *Napue* v. *Illinois*, 360 U. S. 264), accorded petitioner and other Negroes a different treatment than that accorded white witnesses. A state court, also subject to the Fourteenth Amendment (cf. *Shelley* v. *Kraemer*, 334 U. S. 1), sanctioned and enforced the solicitor's discriminatory conduct by punishing petitioner for contempt when she refused to submit to the prosecutor's unwarrantedly familiar mode of addressing her.

The decision below clashes sharply with two interrelated lines of authority in this Court. First, *Johnson* v. *Virginia*, 373 U. S. 61, and *George* v. *Clemmons*, 373 U. S. 241, hold that the State may not inflict the penalty of contempt upon a Negro because he refused to obey an order relegating him to a segregated section of the courtroom. Second, *Strauder* v. *West Virginia*, 100 U. S. 303, holds that the judicial process may not be used to brand a stamp of inferiority on a Negro party litigant. Both are different aspects of a common concern that the State, and particularly its instruments of justice, must keep out of the business of maintaining a racial caste system in the United States.

Johnson v. *Virginia*, *supra*, was, of course, not concerned merely with the abstract question of whether persons may be separated from one another physically. A court may invoke the rule of exclusion and require witnesses to leave the courtroom. If the court had decided to seat spectators in alphabetical order, or to separate them according to whether they were plaintiffs or defendants without regard to race, Johnson certainly would have had no complaint. The constitutional vice in separating Johnson from others was that it enforced a racial caste status, with all the inferiority which that has come to imply in the light of our history.

Strauder v. *West Virginia*, 100 U. S. 303, written with the memory of the slave system still fresh, recognized that the vice in segregation (in that case in the form of exclu-

sion from juries) is not gross physical separation, or indeed prejudice to a particular litigant in the sense that members of another race might be most likely to vote against him. Rather, the evil was that exclusion of Negroes from juries "is practically a brand upon them, affixed by law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others" (100 U. S. at 308).[3]

Of course, a racially inferior caste status can be imposed in ways other than physical separation. A familiar example of discrimination without separation is the law which allows Negro servants or employees to occupy facilities otherwise limited to whites.[4] The crux of the matter is status, not spatial separation.

Petitioner's reaction to being called "Mary" in a courtroom where, if white, she would have been called "Miss Hamilton," was not thin-skinned sensitivity. She was responding to one of the most distinct indicia of the racial caste system. This is the refusal of whites to address Negroes with titles of respect such as "Miss," "Mrs." or "Mr." and to refer to them as "boy" or "girl."

The literature of race relations abounds with recognition of the key role played by this difference in modes of address. Myrdal writes:

---

[3] That the line of cases descending from *Strauder* does not rest upon a concept of injury to a particular defendant is evidenced by *Cassell* v. *Texas*, 339 U. S. 282. In that case there was indictment by a grand jury from which Negroes had been systematically excluded (indeed, there was also systematic *inclusion* of Negroes), but no claim of such exclusion or inclusion with respect to the petit jury. See Justice Jackson's dissent, 339 U. S. at 298, *et seq.*

[4] See, e.g., S. C. Code (1962), §58-1333 (a Negro woman can ride in white car of train if accompanying white child) and La. Stats. Anno. R. S. 14:317 (exception to residential segregation law for employees).

> The Negro is expected to address the white person by the title of "Mr.," "Mrs.," or "Miss." The old slavery title of "Master" disappeared during Reconstruction entirely and was replaced by "Boss" or sometimes "Cap" or "Cap'n." From his side, the white man addresses the Negro by his first name, no matter if they hardly know each other, or by the epithets "boy," "uncle," "elder," "aunty," or the like, which are applied without regard to age. If he wishes to show a little respect without going beyond the etiquette, he uses the exaggerated titles of "doctor," "lawyer," "professor," or other occupational titles, even though the term is not properly applicable. [2 MYRDAL, AN AMERICAN DILEMMA 611 (1944).]
>
> • • • • •
>
> In all articulate groups of Negroes there is a demand to have white men call them by their titles of Mr., Mrs., and Miss; to have white men take off their hats on entering a Negro's house; to be able to enter a white man's house through the front door, rather than the back door, and so on. [1 MYRDAL, AN AMERICAN DILEMMA 64 (1944).]

and John Dollard makes the same point in *Caste and Class in a Southern Town*:

> In Southerntown the use of "Mrs." as a white-caste mark and the omission of it in speaking to Negroes have great emotional value. The Negroes know that to omit the "Mr." in referring to a white man would always mean that the addressee could enforce his right in some uncomfortable way. The main fact is that behind deference from the Negroes is the demand for deference by the whites and the ability to secure it by

> force if it is not willingly given. [DOLLARD, CASTE AND CLASS IN A SOUTHERN TOWN 179 (3rd ed. 1957).]
>
> • • • • •
>
> Negroes are called by their first names without respect to their wishes, as are children. (*Id.*, p. 435.)

In *Patterns of Negro Segregation*, Charles S. Johnson has written:

> Otherwise, only a few whites, usually those who are socially or economically secure, can freely use titles of respect in addressing Negroes. This taboo is deep-seated, involving in a complicated manner, the status, self-interest, and self-conception of the individual white person. [C. S. JOHNSON, PATTERNS OF NEGRO SEGREGATION 140 (1943).]
>
> • • • • •
>
> Formal salutations in letters also fall under the etiquette. When a letter is being addressed to a person known to be a Negro, "My dear" and "Sir" are self-consciously omitted. The letter begins simply "John," or there is no salutation at all, and the envelope carries no title for the name. A prominent Negro woman, president of a state parent-teacher organization in Louisiana, wrote the governor, regarding a question of public concern. She received a reply from the governor's secretary addressing her, without formal salutation, simply as "Huggins." (*Id.*, p. 143.)

In *The Etiquette of Race Relations in the South*, B. W. Doyle has written:

> Negroes normally greet white men with the title "Mister." . . . Occasionally, however, "cap" or "cap'n" or even the round term "boss" may be substituted for "mister," or even just "white folks" may be used. If the

> white persons are well known, Negroes may address them by the intimate "Mr. John" or "Miss Mary," as the case may be. If, however, formality is required the forms may be changed to "Mr. So-and-so" or "Miz . . . So-and-so." [DOYLE, THE ETIQUETTE OF RACE RELATIONS IN THE SOUTH 142 (1937).]
>
> On the other hand, white persons are not expected to address Negroes as "mister"; but "boy" is still good usage as a term to address Negro males of all ages. Even "nigger" is occasionally used. . . . This term does not strictly conform to what is accepted, for Negroes resent it occasionally. Where these terms are not used, the ubiquitous "Jack" and—as on Pullman cars—"George" and "boy" are in good form. (*Id.*, pp. 142-143.)

Robert Moton, too, describes this phenomenon in *What the Negro Thinks*:

> It is to be expected that those persons who find it impossible to give the same consideration in cold type to Negroes which they give to people of other races will find it no more easy to give them the same consideration in personal contacts and in the accepted amenities of our order of civilization; for which reason these same people simply refuse to refer to or address any Negro man or woman as "Mr." or "Mrs." or "Miss," regardless of any legal significance in those terms, especially the title "Mrs." The habit of slavery days was to address the slave by a given name—few of them had any other. If any distinction was to be made between slaves of the same given name on different plantations, the master's name was employed in the possessive as "Thompson's

> John" or "Hightower's Jim." With advancing years, if endowed with sufficient personal dignity and other elements of character, that individual became "Uncle Jim," and in the case of women "Aunt Harriet," instead of simply "Harriet." When the slave became a free man, many of them simply adopted the names of their former masters, but in the order characteristic of a free man; and so he styled himself John Thompson or James Hightower. With it also they adopted the titles of Western democracy "Mr.," "Mrs.," and "Miss." There are many who regard this as a presumption, but in the mind of the Negro it registers not only his respect for himself but his respect also for both men and women in his own race—a distinct gain over the lack of respect characteristic of the status of a slave. [MOTON, WHAT THE NEGRO THINKS 190-191 (1929).]

See also: A. DAVIS & DOLLARD, CHILDREN OF BONDAGE 18-19, 239 (1940); A. DAVIS, B. GARDNER & M. GARDNER, DEEP SOUTH 22, 23, 24 (1941); JOHNSON, PATTERNS OF NEGRO SEGREGATION 121, 122, 135, 138, 139, 140-143, 206, 207 (1943); JOHNSON, GROWING UP IN THE BLACK BELT 277, 278 (1941); JOHNSON, TO STEM THIS TIDE 112 (1943); MOTON, WHAT THE NEGRO THINKS 190-192, 194-196, 215 (1929).

The social effects of maintaining status in this way have been noted elsewhere in American literature as a particularly distinctive indication of racial caste. See: WRIGHT, NATIVE SON 57-58, 177, 258-260, 285 (1957); WRIGHT, BLACK BOY 199-200, 208-209 (1951); see also: BALDWIN, NOBODY KNOWS MY NAME 28, 112 (1963); BALDWIN, GO TELL IT ON THE MOUNTAIN 146-147 (1954); ELLISON,

THE INVISIBLE MAN 384 (1947); SMITH, STRANGE FRUIT 16, 84-85, 92, 141 (1948).

The maintenance of racial caste status by means of titles of address is not unique to the United States.[5] With respect to British colonial countries, Anthony H. Richmond in *The Colour Problem* has written:

> Many Europeans show marked discourtesy to Africans and demand an excessively servile demeanour from them. The European tends to use forms of address, such as "boy," "nigger," "wog," and "kaffir," when addressing or talking about Africans, who very much resent these expressions and the tone of voice that goes with them. [RICHMOND, THE COLOUR PROBLEM 150 (1955).]

And see Sheila Patterson's *Colour and Culture in South Africa*:

> In addressing or referring to other whites whom they do not know well, Afrikaners use the titles *Meneer*, *Mevrou* and *Mejuffrouw*, for "Mr.," "Mrs.," and "Miss" respectively. It is one of the biggest grievances of urban Coloureds who have achieved some status within their own community that comparatively few Afrikaners will accord them these titles. Low-class whites are said to ignore all titles, but better-educated ones will sometimes use such titles as "Reverend," "Doctor" and so on, wherever it is possible. [PATTERSON, COLOUR AND CULTURE IN SOUTH AFRICA 140 (1953).]

---

[5] For origin of the title "Mr." as used in the United States see: NETTELS, THE ROOTS OF AMERICAN CIVILIZATION: A HISTORY OF AMERICAN COLONIAL LIFE 327 (1938); DAWES, "TITLES AND SYMBOLS OF PRESTIGE IN 17TH CENTURY NEW ENGLAND," WILLIAM AND MARY COLLEGE QUARTERLY 69-83 (Jan. 1949); 1 ENCYCLOPAEDIA BRITANNICA, University of Chicago 134d (1963 ed.).

Indeed, more recently, upon Kenya becoming an independent nation, the Minister of Justice and Constitutional Affairs mentioned prominently among the indicia of racial discrimination there the mode of address which had come into usage during colonial days, and directly compared it to that in the United States:

> Many U. S. citizens will know the sort of thing we had to put up with: the separate queues and counters, the exclusion from hotels, restaurants and clubs in our own country. Hospitals, schools, housing and social services were provided on a descending scale of adequacy—Europeans, Asians, Africans. An individual African's ability to pay opened no doors for him. To the racialist settlers, he was a Black, just a "boy," hardly human. [*N. Y. Times Magazine*, December 8, 1963, pp. 24, 112.]

In the United States this use of the term "boy" and the omission of titles of respect when ordinarily they would be accorded whites, has its roots in slavery. In the recent, authoritative evaluation of slavery's role here Stanley M. Elkins has written:

> The Negro was to be a child forever. "The Negro . . . in his true nature, is always a boy, let him be ever so old. . . ." "He is . . . a dependent upon the white race; dependent for guidance and direction even to the procurement of his most indispensable necessaries. Apart from this protection he has the helplessness of a child —without foresight, without faculty of contrivance, without thrift of any kind." Not only was he a child; he was a happy child. Few Southern writers failed to describe with obvious fondness the bubbling gaiety of a plantation holiday or the perpetual good humor that seemed to mark the Negro character, the good humor

of an everlasting childhood. [ELKINS, SLAVERY 132 (Universal Library Ed. 1963).]

* * * * *

Might the process, on the other hand, be reversed? It is hard to imagine its being reversed overnight. The same role might still be played in the years after slavery—we are told that it was[6]—and yet it was played to more vulgar audiences with cruder standards, who paid much less for what they saw. The lines might be repeated more and more mechanically, with less and less conviction; the incentive to perfection could become hazy and blurred, and the excellent old piece could degenerate over time into low farce. There could come a point, conceivably, with the old zest gone, that it was no longer worth the candle. The day might come at last when it dawned on a man's full waking consciousness that he had really grown up, that he was, after all, only playing a part. (*Id.*, at 133.)

During slavery the southern states are said to have universally prohibited slaves from testifying in court, except against each other (Elkins, *op. cit. supra* 57), and the Civil Rights Act of 1870 addressed itself to this by providing that "all persons . . . shall have the same right . . . to sue, be parties, give evidence . . . as is enjoyed by white citizens. . . ." (42 U. S. C. §1981).

It is no more the legitimate business of the states' courts to maintain the racial caste system by using the contempt power in support of racially demeaning forms of addressing Negroes by public officials than it is the states' busi-

[6] Even Negro officeholders during Reconstruction, according to Francis B. Simkins, "were known to observe carefully the etiquette of the Southern caste system." "New Viewpoints of Southern Reconstruction," *Journal of Southern History* V (February, 1939), 52. [This footnote is from the original.]

ness to do the same thing by physical segregation. *Johnson* v. *Virginia*, 373 U. S. 61.

The trial court had two choices, to compel the witness to answer by contempt, or to require the prosecutor to cease his racial abuse. That the latter course would have been correct, is dictated by well accepted legal principles governing examination of witnesses as well as by the Fourteenth Amendment. This Court has held that a prosecuting attorney is a quasi-judicial officer of the court and under a duty not to prejudice a party's case through overzealous prosecution, *Berger* v. *United States*, 295 U. S. 78; *Jencks* v. *United States*, 353 U. S. 657; *Taliaferro* v. *United States*, 47 F. 2d 699 (1931); see also: *O'Neil* v. *State*, 189 Wis. 259, 207 N. W. 280 (1926).[7]

Moreover, the prosecutor has a responsibility not to detract from the impartiality of the courtroom atmosphere.[8]

It is the plain duty of the court to interfere, on objection or without, if an attempt is made by counsel to browbeat, insult, or intimidate witnesses. *Alford* v. *United*

---

[7] Because of the special relationship between prosecuting attorney and court the prosecutor must avoid conduct which is abusive to the witness, *People* v. *LaFrance*, 8 Cal. 839, 92 P. 2d 465; *State* v. *Murdock*, 183 N. C. 779, 111 S. E. 610; *State* v. *King*, 222 S. C. 108, 71 S. E. 2d 793; *Tribue* v. *State*, Fla. App., 106 So. 2d 630; not engage in undignified conduct; *Garret* v. *State*, 268 Ala. 299, 105 So. 2d 541; *Sanford* v. *State*, 38 Ala. 332, 83 So. 2d 254; *Bell* v. *State*, 16 Ala. App. 36, 75 So. 181; or conduct himself in an harassing, intimidating, or insulting manner; Bentham, *Rationale of Judicial Evidence*, Volume II, Chapter V.

[8] *State* v. *Bessa*, 115 La. 259, 38 So. 985 (1905); *White* v. *State*, 135 Tex. Cr. 210, 117 S. W. 2d 450 (1938); (see 21 Ala. Lawyer 193 (1960) address by Judge Walter P. Jones, Montgomery, Alabama); he must avoid making inflammatory argument to the jury, *Viereck* v. *United States*, 318 U. S. 236; and appeals to racial prejudice during the course of his argument, *Loeb* v. *Webster*, 213 Ala. 99, 104 So. 25; *Thomas* v. *Dorsey*, 15 Ala. App. 419, 73 So. 747.

States, 282 U. S. 687; *Havens* v. *State*, 24 Ala. App. 288, 134 So. 814, cert. denied 134 So. 815, 323 Ala. 98 (1930).

The Alabama courts have indicated recognition of the higher interests to be served, as between allowing a witness to be intimidated or harassed, or exempting the witness from testimonial compulsion. In *Havens, supra*, the court said:

> The court should refuse to compel a witness to answer a question which is put for the purpose of harassing him rather than testing his credibility. The foregoing questions were so apparently for the purpose of humiliating or harassing the witness, rather than for the purpose of impeachment, that the court properly exercised his discretion in refusing to permit the witness to answer. *Havens* v. *State*, *supra*, at 815.[9]

The Alabama legislature has erected protections around the witness to support the same policy. Alabama Code, Title 7, §442 (1958) reads:

> It is the right of the witness to be protected from improper questions and from harsh or insulting demeanor.

This case does not present the often difficult question posed by Fifth Amendment or First Amendment claims of privilege, for in those cases if the claim is upheld, the court will be deprived of evidence which may lead to ascertaining the truth. In other words, in those cases it is held, in

---

[9] These considerations have a general importance in the administration of justice in that potential witnesses often walk away from a situation concerning which they may be called to testify, and potential litigants forego rights because going to court involves the possibility of harassment and abuse. See: *Wigmore on Evidence*, §2192, p. 67.

effect, that the social interest in protecting the witness is greater than the interest in learning the facts. See *Wigmore on Evidence*, §2196, p. 111. In this case the truth can be secured by forbidding racial abuse of the witness. But racial abuse of the witness cannot be stopped except by following the course which Miss Hamilton undertook in this case and by reversing the conviction of contempt.

II. *The failure to afford petitioner notice and a hearing before punishing her for contempt was a denial of due process of law.*

The Supreme Court of Alabama held:

> Here, the question was a lawful one and the witness invoked no valid legal exemption to support her refusal to answer it . . . [T]he record supports the summary punishment inflicted (R. 7).

The juxtaposition of these two sentences illumines the fundamental procedural unfairness of petitioner's conviction.

It is true that petitioner was summarily convicted.

It is also true that petitioner was given no reasonable opportunity to prepare and present a defense invoking a "valid legal exemption to support her refusal to answer." Her lawyer was given no opportunity to consult with her, no opportunity to prepare a defense, no opportunity to call witnesses, introduce evidence or otherwise present a defense. In fact, the petitioner's attorney attempted to speak but the court disregarded him and imposed sentence immediately upon the petitioner's refusal to answer (R. 2).

This failure to provide her an opportunity to present a defense and to invoke a state or federal "exemption" was a denial of due process of law.

A person's right to a reasonable opportunity to be heard in his defense is basic in our system of jurisprudence. Except for a narrowly limited category of contempts, due process of law requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, and have a chance to testify and call other witnesses in his behalf.

It is true that courts have long exercised a power summarily to punish certain conduct committed in open court without notice, testimony or hearing. *Ex parte Terry*, 128 U. S. 289. But the holding in the *Terry* case is not to be considered an unlimited abandonment of basic procedural safeguards in contempt cases. Special circumstances were presented in that case. There Terry assaulted the court marshal who was attempting to remove a heckler from the courtroom. This violent misconduct occurred under the eye of the court and physically disrupted the trial court's business. Under these circumstances this Court held that the judge had power to punish an offender at once, without notice and hearing.

That this departure from accepted standards of due process was to be limited to cases of court-disrupting conduct was re-emphasized in *Cooke v. United States*, 267 U. S. 517. The court stressed that the *Terry* rule reached only such conduct as created "an open threat to the orderly procedure of the court in such a flagrant defiance of the person and presence of the judge before the public [that if] not instantly suppressed and punished, demoralization of the court's authority will follow" (267 U. S. at 536).

Re Oliver, 333 U. S. 257, crystallized the rule in this way:

> The narrow exception to these due process requirements [notice and hearing] includes only charges of

misconduct in open court in the presence of the judge which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority before the public." 333 U. S. at 275.

In *Oliver*, a Michigan judge, conducting a "one-man grand jury" investigation in accordance with statutory authority, summarily adjudged Oliver, a witness before the "grand jury", to be in contempt of court because of the apparent inconsistency of his testimony with that of other witnesses. This Court held that the failure to afford Oliver a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law.

More recently, in *Re Green*, 369 U. S. 689, this Court said, reversing an Ohio contempt conviction for lack of a hearing:

> We said in Re Oliver, 333 U. S. 257, 275, 92 L. ed. 682, 695, 68 S. Ct. 499, that procedural due process "requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation."
>
> Petitioner was guilty of no misconduct that fell within the category of acts which constitute contempt in open court, where immediate punishment is necessary to prevent "demoralization of the court's authority" (id. 333 U. S. at 275) or the other types of con-

> tempt considered in Brown v. United States, 359 U. S. 41, 3 L. ed. 2d 609, 79 S. Ct. 539 (369 U. S. at 691-92).

To sum up, the test which this Court has promulgated is that summary convictions will only be permitted when essential to prevent "demoralization of the court's authority before the public."

Such a case is not presented by disobedience of a judge's order to answer questions, such as occurred here.

A refusal to answer questions may be privileged, either as a matter of state or federal law. Put another way, one of the essential elements of misconduct arising out of a refusal to answer is that the refusal be without justification. Thus, a refusal to answer does not present a case "where all the essential elements of the misconduct are under the eye of the court." [10]

This proposition leads to a more central one. Simply stated, permitting a witness to be heard in his own defense does not demoralize the court's authority; rather, it renders that court more worthy of respect. This simple yet fundamental proposition apparently impelled Mr. Justice Black to caution in *Re Oliver, supra*:

> The right to be heard in open court before one is condemned is too valuable to be set aside under the guise of "demoralization of the court's authority." 333 U. S. at 278.

---

[10] Another case where all the essential elements of the misconduct are not under the eye of the Court is where insanity is properly interposable as a defense against a charge of contemptuous misconduct. This was illustrated in the federal system by the case of *Panico* v. *United States*, 375 U. S. 29. There, this Court held that summary punishment could not be imposed for undisputedly contemptuous misconduct in open court if some question existed as to sanity of the putative contemnor.

The guarantees of the due process clause, as we have seen, may only be curbed through imperative necessity.[11] Such necessity did not exist in this case. Petitioner's refusal to answer did not require instant punishment. Her attempt to justify her refusal to answer did not require instant suppression. Her case does require reaffirmation of the traditional constitutional right to notice and a hearing before imposition of a jail sentence.[12]

---

[11] What constitutes such necessity in the federal system was limned by *In Re McConnell*, 370 U. S. 230, where it was held unwarranted to punish by summary proceeding under 18 U. S. C. §401 and Federal Rules of Criminal Procedure, Rule 42(a) the refusal of counsel to abandon a line of questioning forbidden by the judge. There this Court said:

> [B]efore the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice . . .
>
> [T]here was nothing in petitioner's conduct sufficiently disruptive of the trial court's business to be an obstruction of justice. It is true that petitioner stated that counsel had a right to ask questions that the judge did not want asked and that "we propose to do so unless some bailiff stops us." The fact remains, however, that the bailiff never had to interrupt the trial by arresting petitioner, for the simple reason that after this statement petitioner never did ask any more questions along the line which the judge had forbidden. And we cannot agree that a mere statement by a lawyer of his intention to press his legal contention until the court has a bailiff stop him can amount to an obstruction of justice. . . . 370 U. S. at 234-236.

[12] That this case involves issues of constitutional importance is evidenced by the noting of probable jurisdiction in *Ungar* v. *Sarafite*, 375 U. S. 809 (October 14, 1963), which involves issues similar to those presented here.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

JACK GREENBERG
NORMAN C. AMAKER
JAMES M. NABRIT, III
CHARLES H. JONES, JR.
10 Columbus Circle
New York 19, New York

OSCAR W. ADAMS, JR.
1630 Fourth Avenue, North
Birmingham, Alabama

Attorneys for Petitioner

APPENDIX

September 26, 1963

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1963

7 Div. 621

Ex parte MARY HAMILTON

PETITION FOR WRIT OF CERTIORARI TO ETOWAH CIRCUIT COURT

MERRILL, *Justice.*

Petition for writ of certiorari to the Circuit Court of Etowah County to review a conviction of contempt of court.

Petitioner, Mary Hamilton, filed a petition for writ of habeas corpus in the Circuit Court of Etowah County. She was a witness in her own behalf and on cross examination she refused to answer the third question propounded to her. The trial court adjudged her to be in contempt and sentenced her to serve five days in jail and fined her $50. She has served the jail sentence.

The cross examination of petitioner was as follows:

"Q. What is your name, please? A. Miss Mary Hamilton.

Q. Mary, I believe—you were arrested—who were you arrested by? A. My name is Miss Hamilton. Please address me correctly.

Q. Who were you arrested by, Mary? A. I will not answer a question—

By Attorney Amaker: The witness's name is Miss Hamilton.

A. —your question until I am addressed correctly.

The Court: Answer the question.

The Witness: I will not answer them unless I am addressed correctly.

The Court: You are in contempt of court—

Attorney Conley: Your Honor—your Honor—

The Court: You are in contempt of this court, and you are sentenced to five days in jail and a fifty dollar fine."

The power of the several courts to inflict summary punishment upon a witness for refusing to answer a lawful question is specifically authorized in Tit. 13, §2, Code 1940.

"It is every man's duty to give testimony before a duly constituted tribunal unless he invokes some valid legal exemption in withholding it." *Ullmann* v. *United States*, 350 U. S. 422, 76 S. Ct. 497, 100 L. Ed. 511.

Here, the question was a lawful one and the witness invoked no valid legal exemption to support her refusal to answer it.

The record conclusively shows that petitioner's name is Mary Hamilton, not Miss Mary Hamilton.

Many witnesses are addressed by various titles, but one's own name is an acceptable appellation at law. This practice is almost universal in the written opinions of courts.

In the cross examination of witnesses, a wide latitude is allowed resting in the sound discretion of the trial court and unless the discretion is grossly abused, the ruling of the court will not be overturned. *Blount County* v. *Campbell*, 268 Ala. 548, 109 So. 2d 678; *Kervin* v. *State*, 254 Ala.

419, 48 So 2d 204. We hold that the trial court did not abuse its discretion and the record supports the summary punishment inflicted.

PETITION FOR WRIT OF CERTIORARI DENIED.

Lawson, Goodwyn and Harwood, JJ., concur.

THE SUPREME COURT OF ALABAMA

Thursday, September 26, 1963

THE COURT MET IN SPECIAL SESSION
PURSUANT TO ADJOURNMENT

Present:

Chief Justice LIVINGSTON and
Associate Justices LAWSON, SIMPSON, GOODWYN,
MERRILL, COLEMAN and HARWOOD

7th Div. 621

Ex parte:

MARY HAMILTON,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO ETOWAH CIRCUIT COURT

Comes the petitioner, by attorneys, and the Petition for Writ of Certiorari to the Circuit Court of Etowah County, Alabama, being submitted and duly examined and understood by the Court,

IT IS CONSIDERED AND ORDERED that the Petition be, and the same and the same, is hereby denied, at the costs of the petitioner, for which costs let execution issue.

THE SUPREME COURT OF ALABAMA

Thursday, October 31, 1963

THE COURT MET PURSUANT TO ADJOURNMENT

Present: All the Justices

7th Div. 621

Ex parte:

MARY HAMILTON,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT OF ALABAMA, ETOWAH COUNTY, ALABAMA

(Re: Mary Hamilton vs. State of Alabama)
Etowah Circuit Court

IT IS ORDERED that the application for rehearing filed on October 9, 1963, be and the same is hereby overruled.

No Opinion Written on Rehearing.